

82-1718

No.

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ALEXANDER L. STEVAS,  
CLERK

IN THE  
  
**Supreme Court of the United States**

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OCTOBER TERM, 1982

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RANDALL BOOK CORPORATION,  
*Petitioner,*

v.

STATE OF MARYLAND,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF SPECIAL APPEALS OF MARYLAND**

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Attorney for Petitioner.

## QUESTION PRESENTED FOR REVIEW

1. Did the Court of Special Appeals err in its interpretation of *New York v. Ferber*?

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OCTOBER TERM, 1982

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RANDALL BOOK CORPORATION,  
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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

RANDALL BOOK CORPORATION, by David N. Kuryk, its attorney, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland.

## OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported (53 Md. App. 30, 452 A.2d 187, 1982) and is to be found in the Appendix to this Petition. This opinion reverses the trial court's dismissal of the charging documents on January 26, 1982 in the Circuit Court for Baltimore County. On February 24, 1983, the Petition for a Writ of Certiorari to the Court of Special Appeals was denied by the Court of Appeals of Maryland. This is also contained in the Appendix.

## JURISDICTION

The denial of the Petition for a Writ of Certiorari by the Court of Appeals of Maryland occurred on February 24, 1983. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Honorable Court by 28 U.S.C., Section 1257.

## STATUTE INVOLVED

Annotated Code of Maryland, Article 27, Section 416D (1982 Repl. Vol.)

(a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal abuse description or narrative account of these activities or items.

(b) Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it.

## STATEMENT OF THE CASE

Pursuant to a search warrant issued on June 25, 1981, the Baltimore County Police Department, by its agents, Detective Miller and Dunlop, seized 733 items from the book store known as the Rye Book Store at 716 Main Street in Baltimore County, Maryland. The search and seizure was conducted on June 26, 1981. Included in the seizure were a number of magazines, paperback books and films as is more particularly described in the property inventory. As a result of the search and seizure the State of Maryland, by a Statement of Charges and Criminal Summons instituted criminal proceedings charging the Petitioner with violations of Section 416D of Article 27 of the Annotated Code of Maryland. Specifically in case number 08-02-101523 the State has filed 54 charges and in case 08-2-104848 the State has filed 138 charges.

The pattern apparently followed by the State in instituting the charges is that for each publication the State has filed two charges. The first charge is for knowingly displaying for advertising purposes a magazine (Count 1 for each publication — a violation of Section 416D(2) of Article 27) and for knowingly permitting the display of the magazine on premises rented or managed by it (Count 2 of each publication — a violation of 416D(b) of Article 27). Thus in case 08-2-101523 the 60 counts of violations of 416D of Article 27 have been filed based upon 30 publications; in case 08-2-104848 the 138 counts have been filed based upon 69 publications; in case 08-2-10485 the 54 counts have been filed based upon 27 publications. In total 252 counts have been filed against Petitioner for alleged violations of 416D of Article 27 of the Annotated Code of Maryland based upon the State's seizure of 126 publications.

The case was scheduled for trial in the District Court of Maryland for Baltimore County. However, Petitioner

elected a jury trial and the matter was transferred to the Circuit Court for Baltimore County for trial.

Petitioner filed a Motion to Suppress the Evidence and a Motion to Dismiss the charging documents and after submission of Memoranda a hearing was held on November 25, 1981 based upon the legality of the search and seizure and the unconstitutionality of the statute. In an Opinion and Order of the Circuit Court for Baltimore County of January 26, 1982 the Circuit Court for Baltimore County dismissed the charges because of the unconstitutionality of same, however, upholding the legality of the search and seizure.

The State and the Petitioner each appealed from the Opinion and Order of the Circuit Court for Baltimore County. In an opinion filed on November 8, 1982, the Court of Special Appeals, relying upon the recent decision of *Smiley v. State*, 294 Md. 461, 450 A.2d 909 (1982) reversed the decision of the lower court on the constitutional grounds. The Court dismissed the cross-appeal on the ground that absent a conviction the denial of a motion to suppress is not reversible on appeal.

### STATEMENT OF FACTS

The substance of the State's case against Petitioner was the seizure of hundreds of magazines, paperback books and motion picture films which were seized as a result of execution of the search and seizure warrant issued by the District Court of Baltimore County on June 25, 1981. That warrant authorized the police officers to:

A. Enter and search the aforementioned and described premises known as the Randall Book Corporation t/a Rye Book Store located at 716 Main Street, Reisterstown, Maryland 21136 and

B. Seize and remove all books, magazines, photographs, films, and posters that are displayed for advertising purposes which depicts sadomasochistic abuse, sexual conduct and sexual excitement.

The application and affidavit in support of the warrant recites that there was probable cause to believe the laws relating to nudity and sexual displays as defined in Article 27, Section 416A and 416D of the Annotated Code of Maryland were being violated upon the premises known as the Randall Book Corporation t/a Rye Book Store, 716 Main Street in Baltimore County. The interior of the book store was divided into four areas. The front section consisted of old and used paperback books, magazines, and greeting cards that are offered for one-half price. The second section, an "adult section", contained magazines, films, rubber sexual aids and novelties. The magazines and films which were displayed on the shelves or in glass cases were a "sexual spectrum of heterosexuality, homosexuality, lesbianism and sadomasochism." The third section of the book store was a four booth area of "peep" motion picture films. The fourth area of the store was closed.

The application recited the past experience and training of Detectives Dunlop and Miller. The affiants described prior contact with and the charges filed against certain of the employees on prior occasions for violations of Article 27, Section 418 of the Annotated Code of Maryland and Article 27, Section 416D of the Annotated Code of Maryland.

The Application then recites that on June 24, 1981, the co-affiant went to the Randall Book Corporation t/a Rye Book Store and viewed the "adult section" of the book store. The section was arranged in a similar fashion as previously mentioned, i.e., displaying books, magazines, photographs and films for advertising purposes. It then



states that a great majority of said books, magazines, photographs and films depict sadomasochistic abuse, sexual conduct and sexual excitement. Photostatic copies of the covers of some of the magazines mentioned on pages 3, 5, 7 and 8 of the application were attached to the application.

On the basis of this information they requested permission that a search and seizure warrant be issued authorizing the affiants with the necessary and proper assistance to: (a) enter and search the aforementioned and afore-described premises known as the Randall Book Corporation t/a Rye Book Store located at 716 Main Street, Reisterstown, Maryland 21136. (b) seize and remove all books, magazines, photographs, films and posters that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct and sexual excitement.

Based upon the application of June 25, 1981 a search and seizure warrant was issued June 25, 1981 authorizing the officers: "(a) enter and search the aforementioned and described premises known as the Randall Book Corporation t/a Rye Book Store located at 716 Main Street, Reisterstown, Baltimore County, Maryland 21136 (b) seize and remove all books, magazines, photographs, films and posters that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct and sexual excitement."

Based upon the warrant, a search and seizure was conducted at the premises of Rye Book Store at 716 Main Street on June 26, 1981. A massive seizure of all the films, magazines and books in the store took place. The inventory reveals 733 items seized.

Of the items seized the State instituted charges apparently on the basis of 126 of the books and magazines seized.

## REASONS FOR GRANTING THE WRIT

The Court of Special Appeals of Maryland has decided a federal question of substance in a way not in accord with applicable decisions of this Court. The Court of Special Appeals of Maryland was bound by the recent decision of *Smiley v. State*, 294 Md. 461, 450 A.2d 909 (1982) which in turn relied upon the Supreme Court's recent decision in the case of *New York v. Ferber*, \_\_\_ U.S. \_\_\_, 102 S. Ct. 3348, 72 L. Ed. 2d 113 (1982). In Petitioner's view, the Court of Appeals of Maryland has erroneously construed the mandate of *New York v. Ferber* and has applied it in a manner totally inconsistent with the decision of *Ferber* and prior precedent of this Court. Therefore review of the decision of the Court of Special Appeals of Maryland is desirable and in the public interest in view of the unsettled state of law as it now relates to Section 416f through 416g of Article 27 of the Annotated Code of Maryland entitled "NUDITY AND SEXUAL DISPLAYS" and because it will be a recurring question of critical importance in the administration of criminal law as a result of the decision of this Court in *New York v. Ferber*.

This Statute was initially construed by The Court of Appeals of Maryland decision of *Smiley v. State*, 294 Md. 461, 450 A.2d 909 (1982). The Court of Special Appeals, being bound by the opinion of *Smiley v. State*, reversed the judgment of the lower court finding that the Statute as construed by the Court of Appeals passed constitutional muster. Petitioner believes, however, that the construction by the Court of Appeals and so applied by the Court of Special Appeals, in the case of *Smiley* is still constitutionally overbroad and in need of further interpretation because of its apparent ever growing use by the law enforcement authorities of the State of Maryland. To the extent that the Court of Special Appeals of Maryland relied upon the Supreme Court's decision of *New York v. Ferber*, \_\_\_ U.S. \_\_\_ (1982), Petitioner respectfully sug-

gests that such reliance is misplaced. The *Ferber* case involved and this Court's decision was limited to a case of juvenile exploitation in such a work. This Court was not called upon nor did it express an opinion on the statute involving non-juvenile exploitation or distribution. See, e.g., *New York v. Ferber*, \_\_\_ U.S. \_\_\_, 102 S. Ct. 3348 at 3365 (Opinion of Justice Brennan with whom Justice Marshall joined in concurring). The Court of Special Appeals has now applied the *Ferber* decision to a case involving alleged non-juvenile distribution and Petitioner suggests that this Court re-examine its holding in *Ferber* and to make clear that its application to those cases should involve either juvenile sexual exploitation, abuse of children or exposure to juveniles. It is significant that no such limitation is now placed upon Section 416f and 416g of Article 27 of the Annotated Code of Maryland.

### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition be granted.

Respectfully submitted,

DAVID N. KURYK,  
5 Light Street,  
Suite 950,  
Baltimore, Maryland 21202,  
(301) 752-7125,  
Attorney for Petitioner.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of April, 1983, a copy of the enclosed Petition for Writ of Certiorari was mailed to Maureen O'Ferrall Gardner, Esquire, Assistant Attorney General, Munsey Building, 7 North Calvert Street, Baltimore, Maryland 21202, Anthony R. Gallagher, Esquire, Assistant State's Attorney for Baltimore County, County Courts Building, Towson, Maryland 21204 and to the Solicitor General of the United States, Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530.

David N. Kuryk  
David N. Kuryk

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## APPENDIX

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- A. Opinion of the Court of Special Appeals of Maryland
- B. Order of the Court of Appeals of Maryland dated 24 February, 1983.

*STATE of Maryland*

*v.*

*RANDALL BOOK CORPORATION t/a  
Rye Book Store.*

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*No. 238*

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*Court of Special Appeals of Maryland*

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*Nov. 8, 1982*

The Circuit Court, Baltimore County, Cullen H. Holmes, J., granted bookstore's motion to dismiss charging documents alleging violations of statute creating crime of advertising the human body depicting sadomasochistic abuse, sexual conduct or sexual excitement, and State appealed. The Court of Special Appeals, Lowe, J., held that: (1) as construed to proscribe obscenity, the statute is constitutional, notwithstanding want of express statutory requirement that the depictions be obscene, and (2) absent conviction, denial of suppression motion could not be challenged by way of cross appeal.

Reversed and remanded; cross appeal dismissed.

**1. Obscenity — 2.5**

As construed to prohibit advertising depicting obscenity, statute creating crime of advertising the human body depicting sadomasochistic abuse, sexual conduct or sexual excitement is constitutional notwithstanding want of express statutory requirement that such depictions be obscene. Code 1957, Art. 27, §§ 416A, 416D; U.S.C.A. Const. Amend. 1.

## 2. Criminal Law — 1023(10)

A cross appellant may not do on cross appeal what it cannot do on direct appeal, i.e., appeal denial of a motion to suppress, absent a judgment of conviction.

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Maureen O'Ferrall Gardner, Asst. Atty. Gen., with whom were Stephen H. Sachs, Atty. Gen., of Maryland, Sandra A. O'Connor, State's Atty., for Baltimore County and Anthony R. Gallagher, Asst. State's Atty., for Baltimore County on brief, for appellant.

David N. Kuryk, Baltimore, for appellee.

Argued before MORTON, LOWE, and ADKINS, JJ.

LOWE, Judge.

Judge Cullen H. Hormes for the Circuit Court for Baltimore County granted Randall Book Corporation's motion to dismiss charging documents alleging 252 violations of Md. Ann. Code, Art. 27, § 416D, which created the crime of advertising the human body depicting sadomasochistic abuse, sexual conduct or sexual excitement. When that section was enacted,<sup>1</sup> the Legislature, for reasons unbeknownst to us, first added to the original bill,<sup>2</sup> then struck from it, an additional prerequisite to conviction that such depictions be "obscene".<sup>3</sup> Although the

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<sup>1</sup> 1971 Md. Laws Ch. 494.

<sup>2</sup> 1971 Sess. S.B. 798, sponsored by State Senators Pascal, Lipin, McGuirk, Wilson, Thomas, Stone, Bauman and Bozick.

<sup>3</sup> The words "AND WHICH IS OBSCENE" were added by amendment of the Judicial Proceedings Committee in the Senate and deleted by the Environmental Matters Committee of the House of Delegates.

"(a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts [nudity,] sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal



myriad judicial guidelines for gleaning legislative intent are of little help here, it is clear that the Legislature was cognizant of obscenity, if not as preoccupied with it as was the Supreme Court during that era. We can only surmise, if not conclude, that the Supreme Court's admitted frustration in attempting to define obscenity for First Amendment purposes<sup>4</sup> suggested the removal of the controversial term in a vain hope of avoiding that constitutional charybdis.

Because the definitions of the proscribed depictions (especially "somasochistic abuse"), absent the limiting descriptive adjective "obscene", were read on their face as vague and overbroad,<sup>5</sup> Judge Hormes declared the statute

description or narrative account of these activities or items [AND WHICH IS OBSCENE]."

The original act also included "nudity" as a proscribed condition for advertising purposes. That was deleted by an amendment from the floor of the House. This amendment is not relevant to our inquiry.

<sup>4</sup> Two years later in 1973, Chief Justice Burger reviewed in *Miller v. California*, 413 U.S. 15, 20, 93 S. Ct. 2607, 2612, 37 L. Ed. 2d 419, some of the "tortured history of the Court's obscenity decisions", which dissenting Justice Douglas agreed in that respect at least, that "Obscenity — which even we cannot define with precision — is a hodgepodge." *Id.* at 43, 93 S. Ct. at 2625.

<sup>5</sup> Md. Ann. Code, art. 27, § 416A, Definitions, reads in pertinent part:

(c) *Somasochistic abuse* means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

(d) *Sexual conduct* means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) *Sexual excitement* means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity."



unconstitutional, and dismissed the charges against Randall. He pointed out that:

"The objectionable sections of the statutes under the heading 'Nudity and Sexual Displays' are definitions in Art. 27, Sec. 416A, most particularly (c) and (e). The definition of sadomasochistic abuse is broad, going beyond the association of sexual satisfaction with the infliction of pain on others or the receipt of abuse of physical pain to the extent that it would include one who is clothed and bound or physically restrained.

It would appear literally that any religious publication portraying the Crucifixion on its cover would be in violation of the law. What about a cover portraying the fettered young Hardy boy and his girl classmate in a novel entitled 'Kidnapped at Cape Cod'?

Even the term 'sexual conduct' is too broad. The portrayal in a medical text of the self examination of one's breast could be considered '. . . touching of . . . the breasts of the female . . .' under Sec. 416A. Therefore, it is ORDERED, that the indictments of Randall Book Corporation T/A Rye Book Store in cases number 75585, 75586 and 75587 are DISMISSED because of the unconstitutional vagueness or overbreadth in Art. 27, Sec. 416A."

Pursuant to its limited authority to appeal, Md. Cts. & Jud. Proc. Code Ann., § 12-302(c)(1) (1980 Repl. Vol.), the State promptly took advantage of the opportunity.

Prior thereto, the Court of Appeals had decided to review a conviction under the same statute. In the brief opinion of *Blaine Wilson Smiley v. State*, — Md. —, 450 A.2d 090 (1982), practical in result if frugal in explanation, the Court of Appelas declared that "the legislature, in enacting this section was broadly prohibiting advertising depicting obscenity." By doing so, the Court could then look to the guidelines of *Miller v. California*, 413 U.S. 15, 20, 93 S. Ct. 2607, 2612, 37 L. Ed. 2d 419 (1973), which, despite the Supreme Court's dilemma in this field, did "categorically settle" — "that obscene material" (whatever

that means) "is unprotected by the First Amendment." *Id.* at 23, 93 S. Ct. at 2614.

*Smiley* substantially narrowed the breadth of the definitions disturbing Judge Holmes. While he was poignantly correct in suggesting that the Crucifix depicted sadomasochism, as apparently defined absent the unseen adjective, no "reasonable person" would classify it as "obscenely" sadomasochistic when that legislative purpose is read into it. Such was the test the Court of Appeals drew from *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S. Ct. 675, 683, 58 L. Ed. 2d 596 (1979), to determine whether the statute was "so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" As pragmatically limited it now gives fair notice to persons of "ordinary intelligence" what contemplated conduct may be forbidden by the statute. *Smiley, supra*. Without the depiction being obscene it would be absurd to believe that the General Assembly intended to curtail advertising of a religious symbol, or even an innocuous novel, such as pointed out by Judge Holmes. Such absurd implications of legislative intent are not available to us when interpreting statutes. *State v. Fabritz*, 276 Md. 416, 421-422, 348 A.2d 275 (1975).

[1] By imposing upon the Legislature its obscured but necessary intent to proscribe obscenity, and by "authoritatively construing" the Act as limited by the *Miller v. California* restrictive guidelines, *id.* 413 U.S. at 23-24, 93 S. Ct. at 2614-2615, the Court of Appeals declared the statute in question to be constitutional. We are bound by that opinion and need address the constitutional arguments presented in this case no further. We will reverse the judgment of the trial court and remand for further proceedings.

The trial judge chose, in his opinion, to address the motion to suppress the evidence seized pursuant to a search warrant consisting of over 700 offenses. The motion was predicated upon a lack of probable cause and an alleged improper particularization causing the seizure to

be unreasonable. The judge declared that probable cause sufficed and that the items were reasonably particularized.

[2] Randall Book Corporation filed a cross-appeal when the State appealed the dismissal. We know of no authority for the cross-appellant to do on cross-appeal what it cannot do on direct appeal, *i.e.*, appeal the denial of a motion to suppress, absent a judgment of conviction. We will, therefore, dismiss the cross-appeal *sua sponte*.

JUDGMENT REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS.

CROSS-APPEAL DISMISSED.

COSTS TO BE PAID BY APPELLEE-CROSS-APPELLANT.

*In the  
Court of Appeals  
of Maryland*

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*Petition Docket No. 515*

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*September Term, 1982*

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*(No. 238, September Term, 1982  
Court of Special Appeals)*

*Randall Book Corporation t/a Rye Book Store*

*v.*

*State of Maryland*

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**ORDER**

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

*/s/ ROBERT C. MURPHY,  
Chief Judge.*

*Date: February 24th, 1983.*

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ON WRIT OF CERTIORARI TO THE  
COURT OF SPECIAL APPEALS OF MARYLAND

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Special Appeals  
Erred In It's Interpretation of New York v.  
Ferber.

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ON WRIT OF CERTIORARI  
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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and of  
the Press]

Congress shall make no law  
respecting an establishment of reli-  
gion, or prohibiting the free exer-  
cise thereof; or abridging the free-  
dom of speech, or of the press; or  
the right of the people peaceably to  
assemble, and to petition the

Government for a redress of grievances.

Annotated Code of Maryland, Article 27, §416A:

**416A     Definitions**

The following words and phrases, as used in this subheading, have the meanings indicated:

a.     Advertising purposes means the purpose of propagandizing in connection with the sale commercially of the product or products, or the offering commercially of a service, or the exhibiting commercially of entertainment.

b.     Minor means any person under eighteen years of age.

c.     Sadomasochistic abuse means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

d.     Sexual conduct means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

e. Sexual excitement means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sexual experiences of humans engaging in or witnessing sexual conduct or nudity. (1971, ch. 494).

416D      Displaying certain visual representations for advertising purposes.

a. Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items.

b. Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it. (1971, ch. 494)

STATEMENT OF THE CASE

On October 6, 1981, charging documents were filed against Randall Book Corporation, Petitioner, charging Petitioner with 252 violations of Md. Ann. Code, Article 27, §416D. Appellee filed a Motion to Dismiss alleging, among other grounds, that Article 27, §416D was unconstitutional because the statute was both vague and overbroad. Following a hearing on November 25, 1981, an Opinion and Order was entered on January 26, 1982, dismissing the charging documents because of the Court's decision that Article 27, 416A, "most particularly" subsections (c) and (e), which defines the terms used in Article 27, §416D, is vague and overbroad. A timely appeal was filed by the State on February 9, 1982. Petitioner cross-appealed the denial of its Motion to Suppress. On November 8, 1982, the Court of Special Appeals reversed the judgment of the Circuit

Court and found Article 27, §§416 A and D to be constitutional. It dismissed Petitioner's cross-appeal due to the absence of a final judgment. On February 24, 1983, the Court of Appeals denied Petitioner's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner contends that the Court of Special Appeals erred in its reliance on New York v. Ferber, \_\_\_\_ U. S. \_\_\_\_, 102 S. Ct. 3348, 72 L.Ed.2d 113 (1982). The gist of the supposed error is that the facts in Ferber are distinguishable from the facts of this case.

This contention is completely without merit, because the Court of Special Appeals did not rely on Ferber in any respect in deciding this case. Indeed, its decision does not even mention Ferber. Thus the question which Petitioner claims is presented for

review by the decision of the Court of Special Appeals in this case is answered quite simply by the fact that, because no reliance on Ferber is indicated, no error of interpretation could have occurred.

Petitioner's "Reasons for Granting the Writ" embody the following attenuated, indeed tortuous, logic: (1) In this case the Court of Special Appeals, declared itself bound by the decision of the Maryland Court of Appeals in Smiley v. State, 294 Md. 352, 450 A.2d 909 (1982). (2) Smiley, in turn, which referred to this Court's decision in Ferber, supra, relied on the factual similarity between it and Ferber. (3) Even if Ferber was validly applied in Smiley, its logic does not extend to this case, because the facts are different. A brief consideration of both the underlying propositions and the resulting conclusion reveals that this train of logic is erroneous and affords no proper basis for

the exercise of this Court's discretionary review.

Article 27, §§ 416A and D of the Maryland Code proscribe the use for advertising purposes of certain depictions of sexual conduct. The statute does not explicitly require that the proscribed depictions be "obscene".

In Smiley, the Court of Appeals considered whether this omission of an explicit requirement for obscenity rendered §§416A and D unconstitutional. Two constitutional defects were alleged: (1) a due process violation because of an alleged lack of guidelines as to what conduct was proscribed by those sections; and (2) a First Amendment violation because of alleged overbreadth.



The Court of Appeals held that, as to the due process claim, the legislative intent revealed that the challenged section "was broadly prohibiting advertising depicting obscenity", 294 Md. at 464. As a result, the challenged provisions were read to embody the guidelines set forth by this Court in Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973). In a footnote to this discussion, the Court pointed out in passing that, as construed, §416D "also embodied" the principle announced by this Court in New York v. Ferber, supra, that a state's interest in safeguarding the physical and psychological well-being of minors is compelling. Id.

On the question of the statute's overbreadth, the Court of Appeals held that the statute was not substantially overbroad. Any minor overbreadth, it said, could be cured through case by case analysis, citing



Ferber, 294 Md. at 462. However, the portion of Ferber relied on by the Court of Appeals in Smiley did not relate to Ferber's factual underpinnings. Rather, the Court of Appeals simply relied on Ferber's reaffirmation of the well-settled principle, first enunciated in Broderick v. Oklahoma, 413 U. S. 601, 615-616, 93 S. Ct. 2908, 2918, 37 L.Ed.2d. 830, 843 (1973), that facial overbreadth challenges must show that the challenged statute reaches a substantial number of impermissible applications, not merely that "it is possible to conceive of a single impermissible application." Id., 413 U. S., at 630, 93 S. Ct., at 2925.

In neither of its references to Ferber did the Smiley Court discuss or rely on the facts of Ferber. It made reference solely to certain legal principles discussed by this court in the Ferber opinion. Thus, the Court of Appeals did not suggest that Smiley was

factually similar to Ferber let alone find factual similarities to be crucial.

Similarly, the decision of the Court of Special Appeals in this case makes clear that its reliance on Smiley had nothing to do with the facts presented either by Smiley or by Ferber. Instead, it relied on the Smiley court's "authoritative construction" of a state obscenity statute, a procedure expressly authorized by this Court in Miller v. California, 413 U. S., at 24, 37 L.Ed.2d. at 430, 93 S. Ct. at 2615. Thus, the facts underlying Ferber, in addition to being unrelated to that case's citation in Smiley, are completely and totally irrelevant to this case.

Finally, Petitioner states no federal question requiring this Court's attention. The principles enunciated in Ferber clearly disposed of the questions concerning the constitutionality of Article 27, §§416A and

D, as raised in Smiley. That interpretation similarly controls this case. Thus there is no need for this Court to reexamine its holding in Ferber and no proper case presented here for review of Ferber's application to Maryland criminal law.

#### CONCLUSION

For the foregoing reasons, Respondent requests this Court deny the Petition for Writ of Certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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